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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-559

UNITED STATES OF AMERICA, *Petitioner*

vs.

CHESTER FULLER and MAXINE FULLER

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Respondents' Brief in Opposition

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Petitioner's Appendix A) is reported at 442 F.2d 94.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether, in determining the compensation due an owner of land taken by the United States, the jury may consider the availability and accessibility of public lands, so long as consideration is also given the possibility that the grazing permits on the public land may be withdrawn.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A at pp. 11-13.)

ARGUMENT

Petitioner claims that the rationale of *United States v. Rands*, 389 U.S. 121, is applicable here and that therefore the decision below is in conflict with *Rands*. Respondents submit that the Court of Appeals correctly determined that a careful examination of the rationale of the navigational servitude cases on the one hand and the federal legislation regarding grazing permits on the other, reveals a basis for distinguishing the cases relied upon by the government.

Perhaps more importantly, *Rands* and its predecessors appear to have been legislatively set aside by a statute subsequently enacted by the Ninety-First Congress.

Turning first to the features of this case which render it factually distinguishable from the navigational servitude situations, it becomes at once apparent that the present decision is fully in accord with the only other decision by a Court of Appeals in which the same issue has been squarely presented, *United States v. Jaramillo*, 190 F.2d 300 (10th Cir. 1951). (See Petitioner's Appendix A at 13). In the instant case, the District Court's instruction to the jury was strictly in accord with *Jaramillo*, wherein a

unanimous opinion noted that the forest grazing permits involved therein had not been revoked or withdrawn on the date of the government's taking, whereas in *United States v. Cox*, 190 F.2d 293 (10th Cir. 1951), *cert. denied* 342 U.S. 567, the grazing permits were revoked coincidentally with the taking of the fee. The Court of Appeals in *Jaramillo* no doubt recognized that the land owner was entitled to be placed in as good a position pecuniarily as he would have occupied had his property not been taken, *United States v. Miller*, 317 U.S. 369, and that in so doing the existence of the unrevoked permits was a necessary and proper consideration for the trier of fact.

The opinion below correctly noted that the Taylor Grazing Act, 48 Stat. 1270, Section 3, as amended 43 U.S.C. 315b, created permits conferring upon the holders thereof certain preferential rights and distinguishing features (Petitioner's Appendix A at 16-17) which compel the conclusion that the government's control over Taylor Grazing Act lands is not the same degree of control enjoyed under the navigational servitude conferred upon the government by the Commerce Clause of the Constitution, Art. I, Sec. 8, and that Congress exercised less than its constitutional power over public lands in enacting the Taylor Grazing Act, recognizing special rights against third parties and sometimes the government itself.

Although respondents are confident that the decision of the court below is in no manner in conflict with *Rands*, any bearing *Rands* might have had upon this case by way of analogy has been taken away by subsequent Congressional enactment.

The Ninety-First Congress, in enacting the Rivers and Harbors Act of 1970, Pub. L. 91-611, Title I, § 111 (Dec. 31, 1970), 84 Stat. 1821, 33 U.S.C.A. § 595a, legislatively set

aside *Rands*, and its predecessors. The statute provides in part:

> "In all cases where real property shall be taken by the United States for the public use in connection with any improvement of rivers, harbors, canals, or waterways of the United States, and in all condemnation proceedings by the United States to acquire lands or easements for such improvements, the compensation to be paid for real property taken by the United States above the normal high water mark of navigable waters of the United States *shall be the fair market value of such real property based upon all uses to which such real property may reasonably be put, including its highest and best use, any of which uses may be dependent upon access to or utilization of such navigable waters. . . .*"
> (Emphasis Supplied, Respondents' Appendix A)

With this enactment, the onerous rule of *Rands* that condemnees are not entitled to compensation based upon value inhering in land due to its contiguity to navigable waters has been overruled by Congress. *United States v. 8968.06 Acres of Land, Etc., Texas,* 326 F. Supp. 546 (S.D. Tex. 1971). In light of this statute it is abundantly evident that the government's reliance upon *Rands* is misplaced.

The Ninety-First Congress by providing in the Rivers and Harbors Act of 1970 that the highest and best use of real property taken by the government may be dependent upon access to or utilization of navigable waters, has clearly declared the government's policy in this area. This enactment provides a persuasive capstone to the already compelling reasons why this Court should end this litigation by denying certiorari.

The Court of Appeals soundly observed:

"The purpose of the Taylor Grazing Act was to develop and stabilize the western cattle business. By providing for regulated use and protection of grazing rights, the government helped to improve the use of the land as did the changes which effected public use of the river in *Monongahela*. The difference between our case and that is one of degree.

It was, therefore, not improper for the trial court to allow the jury to consider the conjunctive use of the fee and permit lands, so long as the jury was admonished to consider the possibility that the permits might be withdrawn at any time without compensation."

(Petitioner's Appendix A at 17-18)

For the foregoing reasons, it is respectfully submitted hat the petition for a writ of certiorari should be denied.

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